

ORDERED LIBERTY: A RESPONSE TO THREE VIEWS

**ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES,
AND VIRTUES.** James E. Fleming and Linda C. McClain.
Cambridge, Mass.: Harvard University Press. 2013. Pp. 371.
\$49.95 (Cloth).

*James E. Fleming**
*Linda C. McClain***

We wish to begin by thanking *Constitutional Commentary* for publishing these three thoughtful reviews of our book, *Ordered Liberty: Rights, Responsibilities, and Virtues*. The essays by Abner Greene, Ken Kersch, and Toni Massaro¹ reflect a rich and illuminating range of perspectives on our project. We will respond briefly to each.

I. TONI M. MASSARO, *SOME REALISM ABOUT CONSTITUTIONAL LIBERALISM*

We are grateful to Toni Massaro for her careful and sympathetic reading of our book. It is encouraging that she believes that *Ordered Liberty* contributes to making sense of contemporary rights practice—and liberal democracy—in the United States. We concur with her that the November 2012 election provides a useful opportunity, both before the election, when she wrote her review, and after, as we write this response, to reflect on “the national mood” with respect to the evident competing visions of government “as ally” versus government

* The Honorable Frank R. Kenison Distinguished Scholar in Law, Associate Dean for Intellectual Life, and Professor of Law, Boston University School of Law.

** Paul M. Siskind Research Scholar and Professor of Law, Boston University School of Law. Thanks to Courtney Gesualdi for help with this essay.

1. Abner S. Greene, *State Speech and Political Liberalism*, 28 CONST. COMM. 421 (2013); Ken I. Kersch, *Bringing It All Back Home?*, 28 CONST. COMM. 407 (2013); Toni M. Massaro, *Some Realism About Constitutional Liberalism*, 28 CONST. COMM. 383 (2013).

“as antagonist.”² She helpfully relates these clashes at the level of political campaigns to the broader debates over constitutional law and political theory that we address. Moreover, it is especially encouraging that she concludes that the book has something useful to say to “the various patriot armies marching under American constitutional banners.”³ Indeed, this assessment contrasts sharply with that of Ken Kersch, who faults us for situating our book—including its title—“at a stratospheric level of abstraction,” oblivious to the practical battles of contemporary social and political movements taking place on the ground below.⁴

Massaro grasps that claims about the Constitution and about the best balance between rights and responsibilities, governmental authority and individual liberty, liberty and equality, and so forth, are at issue in many of these movements. Again, a contrast with Kersch’s review is instructive. While he views our project as straining to produce a “new liberalism” relevant to America,⁵ Massaro perceives that “the scope and content of constitutional liberalism are very much at issue” in contemporary national debates about “the proper reach of government authority.”⁶ She indicates that *Ordered Liberty* can provide “[m]ore realism about our constitutional liberalism.”⁷ She argues that our book shows “the complexities and paradoxes of our constitutional law *as it is*” at a time when “a growing number of people” argue for “tectonic changes” in it and “some even favor a second constitutional convention.”⁸ We consider our time on the book well spent if a thoughtful scholar like Massaro draws this conclusion, given her own substantial contributions to making sense of some of the constitutional controversies we take on in *Ordered Liberty*.

In that regard, we especially appreciate her image of a “liberty spectrum” as a way to characterize what we describe as thin versus thick justifications for rights, and her observation that constitutional rights can migrate from one end of the spectrum to the other over time.⁹ She offers the example of the evolving level of constitutional protection for gay men and

2. Massaro, *supra* note 1, at 383.

3. *Id.* at 406.

4. Kersch, *supra* note 1, at 409.

5. *Id.* at 419.

6. Massaro, *supra* note 1, at 385.

7. *Id.* at 404.

8. *Id.* at 403 (emphasis in original).

9. *Id.* at 397–400.

lesbians, from decriminalizing sodomy on a toleration rationale to allowing same-sex couples to marry (a move, we suggest, entailing appeals both to rights and to moral goods (pp. 177–206)). Her point that “constitutional liberalism *in practice* is both thick and thin”¹⁰ is one missed by Kersch, who views our approach to rights justification as moving immediately to full respect and appreciation and leaving out steps along the way.¹¹ It does not.

Massaro praises us for clearing up many “false dichotomies” about constitutional liberalism and the relationships among rights, responsibilities, and virtues. However, she comments that we introduce a false dichotomy of our own—that between responsibility as autonomy and responsibility as accountability.¹² She makes some cogent points here (for example, “one parent’s liberal-inspired civic education may be another’s illiberal inculcation of secular humanism”). She contends: “There is no such thing as neutral government education, or a neutral formative project.”¹³ This is a fair point. But we do not argue for neutrality in the sense of a value-free formative project or a government that is completely neutral about which ends it should promote. To be sure, some people will reject government’s ends as an “orthodoxy” contrary to their basic values. We used the autonomy/accountability point to stress the importance of a realm of personal self-government. When we said that the two were related, we meant to get at the authority of government to engage in a formative project and also to try to persuade or promote its own ends. Further, we meant to acknowledge that, in a regime that protects rights to self-government, there is ample room for non-governmental actors—be they individual citizens or social movements—to voice views about rights and their responsible exercise. (pp. 40–45) We concur with Massaro (as well as with Abner Greene, discussed below) that a critical distinction between these two forms of responsibility is that between coercion and persuasion. As Massaro observes, “responsibility as autonomy more emphatically focuses attention on the liberal concern about coercion.”¹⁴

10. *Id.* at 397.

11. Kersch, *supra* note 1, at 414–15.

12. Massaro, *supra* note 1, at 400–01.

13. *Id.* at 401.

14. *Id.*

II. KEN I. KERSCH, *BRINGING IT ALL BACK HOME?*

Kersch titles his essay “Bringing It All Back Home”? As Bob Dylan fans who love his album of that name, we take the title as a compliment, even if Kersch did not exactly intend it as such. It is an unwitting compliment in that, even while Kersch faults our book for supposedly being pitched, like the work of John Rawls and Ronald Dworkin, at “a stratospheric level of abstraction,”¹⁵ he credits us with bringing our analysis back home to the American constitutional order. What is more, even as he criticizes our book for aiming at timeless abstractions, he acknowledges “the book’s . . . substantive timeliness” and its “perfect harmony with the moment.”¹⁶ We daresay that only someone with a strong allergic reaction to the very mention of Rawls and Dworkin would fault our book for a “stratospheric level of abstraction.” We appreciate Massaro’s praise for the concreteness of our engagement with the cases protecting basic liberties, our understanding of the social movements supporting (and opposing) recognition of these liberties, and our justifications for the basic liberties in the context of our present predicaments.

Further developing his thought about timeliness, Kersch suggests that the publication of our book demonstrates that “[y]et another Owl [of Minerva], it seems, has taken flight.”¹⁷ We take his allusion to Hegel’s Owl of Minerva with reference to our book as another unintended compliment. For, in Hegel’s formulation, the owl has wisdom in understanding an historical era that has just come to a close. But his allusion is incomplete, for he does not establish that the era we show wisdom in understanding has come to a close rather than perhaps faces a bright future. For the allusion to have genuine purchase here, the Supreme Court would have to overrule or cut back on *Lawrence v. Texas*¹⁸ or *Planned Parenthood v. Casey*¹⁹ or the whole line of cases protecting basic liberties under the Due Process Clause just as we published our book’s full and coherent justification of them—just as our form of civic liberalism had “gotten right with America” and brought the communitarian and conservative critics of liberalism “up-to-date, and show[ed] them

15. Kersch, *supra* note 1, at 409.

16. *Id.* at 414, 419.

17. *Id.* at 410.

18. 539 U.S. 558 (2003).

19. 505 U.S. 833 (1992).

up.”²⁰ Such changes hardly seem imminent, though we concede that Kersch could prove to be a seer.

In response to Kersch’s criticisms, we shall make several clarifications of our project, namely: (1) the character of our synthesis of liberalism and republicanism; (2) our understanding of “ordered liberty” in relation to Justice Cardozo’s; (3) our invocation of Justice Harlan’s idea of the “rational continuum” of ordered liberty; and (4) our reasons for focusing on the Due Process Clause as a battleground concerning rights, responsibilities, and virtues.

A. OUR “GRAND THEORETICAL SYNTHESIS” OF LIBERALISM AND REPUBLICANISM

We appreciate Kersch’s acknowledgment of the ambition of our project—that it aims at “grand theoretical synthesis” of liberalism with civic republicanism and communitarianism (and, we would add, feminism).²¹ But we disavow any aim “to bring the liberal-communitarian debate to a close.” To the contrary, we seek to advance this debate constructively, with the full expectation that it will prove enduring or, as he puts it, “perpetual.”²² We are baffled by his statement that “[a]mongst American historians, that debate, under the guise of liberalism vs. republicanism, was brought (more or less) to a close some time ago.” He suggests that scholarship in constitutional theory like ours has lagged behind.²³ With all due respect, the debate among American historians about liberalism versus republicanism to which Kersch refers was a very different debate from that in which we are engaged in our book. That was a debate between Louis Hartz on the one hand and Gordon Wood and J.G.A. Pocock on the other hand.²⁴ That debate centered on the clash between liberalism and republicanism in the founding of the American constitutional order.

We do not enter into that debate. We focus on a different one: how best to justify constitutional rights—in particular, basic liberties under the Due Process Clause—in the here and now.

20. Kersch, *supra* note 1, at 410, 419.

21. *Id.* at 409.

22. *Id.* at 410.

23. *Id.* at 409.

24. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1969).

Michael Sandel's civic republican and Cass Sunstein's minimalist republican criticisms of liberal justifications for the right of privacy post-1986—when the Supreme Court decided *Bowers v. Hardwick*²⁵—not the republican versus liberal understanding of the founding in 1787, are the concerns of our synthesis. Autonomy versus moral goods (pp. 177–206) and minimalism versus perfectionism (pp. 207–35) as grounds for justifying basic liberties are our concerns, not Locke versus Machiavelli in relation to the American founding. As far as we know, American historians have hardly begun to consider the former debate, if at all, though they did exhaustively engage with the latter debate about twenty-five years ago.²⁶

B. OUR ASPIRATION TO “ORDERED LIBERTY”

Kersch criticizes our invocation of the concept of “ordered liberty” along with that of “autonomy.” After criticizing the “characteristic abstractions of this literature,” he asks: “And since when has a commitment to ‘dignity,’ ‘autonomy,’ ‘equal concern and respect,’ or ‘the common good’ ever decided a concrete case as a logical deduction from principle?”²⁷ And he asks, skeptically, “how much work can the concept [of ordered liberty] actually do?”²⁸ Thus, he seems to suggest that our arguments for basic liberties proceed “as a logical deduction” from the principle of ordered liberty or autonomy.

We fear that Kersch has misunderstood our argument. First, we do not present constitutional interpretation of the Due Process Clause as a matter of making logical deduction from abstract principles. To the contrary, we present it largely as a matter of common law interpretation, developing a line of cases protecting basic liberties through reasoning by analogy from one case to the next and, over time, elaborating the principles and frameworks that best fit and justify the cases. (pp. 237–72) That is, we work up an account of and justification for the line of cases already decided, concretely. We present the cases as manifesting a concern to secure the basic liberties that are preconditions for deliberative autonomy.²⁹ We do not begin with abstract

25. 478 U.S. 186 (1986).

26. See, e.g., *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

27. Kersch, *supra* note 1, at 412.

28. *Id.*

29. For fuller elaboration of the idea of “deliberative autonomy,” see JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 89–111 (2006).

principles of deliberative autonomy and ordered liberty and make logical deductions from them to decide cases. Here we surmise that Kersch's aversion to anything Rawlsian or Dworkinian may have clouded his reading.

Kersch characterizes "ordered liberty" as Justice Cardozo's phrase in *Palko v. Connecticut* (1937).³⁰ He criticizes our account because we "don't set the context" for Cardozo's usage of the concept of "ordered liberty," namely, that of distinguishing (1) those provisions of the Bill of Rights which are fundamental and therefore "incorporated" by the Fourteenth Amendment and made applicable to the states, and (2) those which are not.³¹

We do not set the context for Cardozo's usage of ordered liberty because we are not using his conception of ordered liberty. As a matter of fact, we reject Cardozo's conception. For one thing, we agree with Justice Black as against Justice Cardozo that the Fourteenth Amendment incorporates *all* of the provisions of the Bill of Rights, not just selectively incorporates some of them.³² For another, we emphatically reject Cardozo's conclusion in *Palko* itself that freedom from double jeopardy is not a basic liberty protected against state infringement.

More generally, we would insist that the phrase "ordered liberty" is nobody's property. It is a phrase in common usage in political and constitutional discourse. In *Palko*, Cardozo used the term in the context of "selective incorporation" of certain rights enumerated in the provisions of the Bill of Rights through the Due Process Clause. In *Roe v. Wade*, Justice Blackmun used the term in the context of deciding what rights that are not enumerated in the provisions of the Bill of Rights are nonetheless protected by the Due Process Clause.³³ In *Rights Talk*, Mary Ann Glendon used the term "ordered liberty," mentioning Cardozo and other sources, to express an aspiration of communitarians in contrast with what she depicted as liberals' pursuit of "liberty as license."³⁴ In developing a civic liberalism, we sought to reclaim the concept of ordered liberty from conservatives like Glendon who in recent years have claimed a monopoly on it. And we propounded ordered liberty as

30. Kersch, *supra* note 1, at 412 (discussing *Palko v. Connecticut*, 302 U.S. 319 (1937)).

31. *Id.* at 417.

32. See *Adamson v. California*, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting).

33. 410 U.S. 113, 152–54 (1973).

34. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 10, 14 (1991).

encapsulating one of the ends of our constitutional order proclaimed in the Preamble to the Constitution and one of the aspirations of our framework for ordering rights, responsibilities, and virtues. To respond directly to Kersch's challenge, that is the "work" that ordered liberty actually does in our project, not "logical deduction from principle."³⁵

C. OUR INVOCATION OF JUSTICE HARLAN'S IDEA OF THE
"RATIONAL CONTINUUM"

Finally, after characterizing the conservative Justice Harlan as our "hero," Kersch charges us with selective invocation of Harlan's constitutional jurisprudence.³⁶ More generally, he criticizes our book for its "selection bias" (to which we return below). He charges that we analyze "a subset of constitutional cases whose selection is both theoretically and historically skewed to support [our] thesis," further charging that "[t]hese cases do not effectively speak to the full universe of civil liberties concerns."³⁷ We set out to write a book that would focus on demonstrating the ordering of rights, responsibilities, and virtues in cases protecting substantive basic liberties (or not) under the Due Process Clause. Hence, we are puzzled by the criticism that we did not undertake to examine "the full universe of civil liberties concerns." Indeed we did not.

Let us make clear that in our explication of "the myth of strict scrutiny for fundamental rights" under the Due Process Clause in Chapter 9 of our book—when we invoke Harlan's idea of the "rational continuum" of liberty and judgment from his dissent in *Poe v. Ullman*³⁸ as against the idea of absolutist, rigidly maintained tiers of scrutiny—we are not embracing Harlan as our "hero" any more than we are the authors of the joint opinion in *Casey*, Justices O'Connor, Kennedy, and Souter. We are claiming only that in *Poe* and *Casey*, these justices propound a better understanding of the "rational continuum" of liberty and judgment—as they have operated in the American constitutional practice of interpreting the Due Process Clause to protect substantive liberties from *Meyer v. Nebraska* (1923) to the present—than do originalist critics of substantive liberties like Justice Scalia and communitarian critics of "rights talk" like

35. Kersch, *supra* note 1, at 412.

36. *Id.* at 416, 418–19.

37. *Id.* at 419.

38. 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

Glendon. (pp. 237–72) Making this claim in no way commits us to embracing Harlan’s constitutional jurisprudence as a whole.

Truth be told, if there is a “hero” in our analysis of the Due Process Clause, it is Justice Stevens. We praise his famous critique of the framework of strict scrutiny under the Equal Protection Clause, embracing his argument for a “continuum of judgmental responses” instead of a framework of absolutist, rigidly maintained tiers of scrutiny. (p. 240) We model our criticism of the framework of strict scrutiny under the Due Process Clause on his critique, demonstrating an analogous “continuum of judgmental responses.” (pp. 240–41)

Finally, our exposing the “myth of strict scrutiny for fundamental rights” under the Due Process Clause, contrary to Kersch’s suggestion, is not inconsistent with treating the basic liberties protected under that clause as “preferred freedoms.” We are not throwing the baby out with the bathwater.³⁹ We argue that our constitutional practice has protected basic liberties under the Due Process Clause “stringently”—thus according them a “preferred position”—not absolutely, as they would be under the mythical framework of strict scrutiny. (pp. 237–72)

D. OUR REASONS FOR FOCUSING ON THE DUE PROCESS CLAUSE

We want to close by responding to Kersch’s more general criticism of our account of “ordered liberty” for its “selection bias.”⁴⁰ We have written a book focusing on cases protecting substantive basic liberties (or not) under the Due Process Clause rather than a book more broadly covering “the full universe of civil liberties concerns.”⁴¹ He evidently concedes that the cases protecting rights under the Due Process Clause are “ripe for re-description as implicating serious questions of the public good, responsibility, citizenship, and virtue.”⁴²

But, Kersch argues, “the problem” is that these types of cases are “only a small part of ‘rights revolution’ cases that conservatives and communitarians criticize for being overly solicitous of claims anchored in arguments about autonomy.” He continues: “Where, I wondered, was the discussion of the claims

39. Kersch, *supra* note 1, at 418.

40. *Id.* at 412, 414.

41. *Id.* at 419.

42. *Id.* at 414.

of autonomy in cases involving, say, a jacket that says ‘Fuck the Draft,’ flag-burning, nude-dancing, the possession of pornographic films, cross-burning, hateful disruptive protests at military funerals, the banning of violent video games, the aggressive defense of criminal process rights, including aggressive assertions of the Fifth Amendment in cases involving charges of domestic subversion, etc.’”⁴³

To the charge of “selection bias,” we have three responses. One, our decision to write a book focusing on cases protecting substantive basic liberties (or not) under the Due Process Clause rather than taking up all of the claims he mentions is eminently defensible on the ground that these cases raise the “culture war” issues that divide liberals from communitarians like Glendon and civic republicans like Sandel. These cases have constituted the most contested battleground concerning rights, responsibilities, and virtues in recent years.

Two, we would observe that, remarkably, at the present time, on most of the First Amendment issues he mentions, liberals and conservatives have united in support of a neutral, absolutist First Amendment (though we reject it). We observed this development in Chapter 2 of our book, noting that many communitarians who call for encouraging responsibilities and inculcating virtues where Due Process liberties are concerned have embraced the neutral, absolutist First Amendment and rejected restrictions upon many of the types of speech that Kersch lists. (pp. 37–39) Moreover, we specifically discussed the military funeral protest case. Far from being “skittish” about “those types of issues,”⁴⁴ we criticized the conservative Roberts Court for its absolutist First Amendment jurisprudence that rejected the claims of community and harm. We expressed our agreement with Justice Alito’s dissent (and with retired Justice Stevens’s criticism) arguing that the case was wrongly decided. (pp. 38–39)

And three, writing a book that aimed to analyze rights, responsibilities, and virtues across all of constitutional law not only would have been too unwieldy and too abstract, but also probably would have been incoherent. We do not claim that there is an aspiration to ordered liberty that embraces the “full universe of civil liberties concerns.” Our concern in the book is with articulating “the most defensible ordering of rights,

43. *Id.*

44. *Id.*

responsibilities, and virtues in the American constitutional order” as far as substantive basic liberties protected (or not) under the Due Process Clause are concerned. (p. 3) That project is ambitious enough and in any case is eminently defensible.

III. ABNER S. GREENE, *STATE SPEECH AND POLITICAL LIBERALISM*

If Toni Massaro assesses our project from the standpoint of a sympathetic civic liberalism, Abner Greene criticizes it from the standpoint of a fellow political liberal traveler. Over the years, both of us have benefitted from engaging with Greene—in person and in print—about various dilemmas posed by pluralism, governmental speech, and a constitutional order premised on, as he aptly calls it in the subtitle of his own recent book, “multiple sources of authority.”⁴⁵ For example, his work has informed our own analysis of the tensions within our constitutional order concerning the relationship between government and civil society—whether the latter, as seedbeds of civic virtue, is congruent with and undergirds the political order, or instead functions as sources of norms and values distinct from those and as a buffer against governmental power. (pp. 146–47) In addition, we agree with Greene that government may use methods short of coercion to persuade about public values and constitutional principles.

However, Greene also maintains that government is “just one repository” of the people’s power among others and must compete, after all, for the people’s allegiance.⁴⁶ By contrast, we believe that the status of citizen and the ideal of free and equal citizenship—and the norms attendant to being a citizen—are weighty and not simply one contender in the marketplace for allegiance. We also argue that, in addition to using its persuasive power, government may use tools like antidiscrimination laws to promote free and equal citizenship. These laws are not simply persuasive, in expressing ideals, but also harness the state’s coercive power by commanding people and institutions that they may not act in certain ways—and must act in certain ways (that is, provide goods and services in a nondiscriminatory matter). This, of course, raises the question of the permissible scope of exemption from such laws when the public norms they embody

45. ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

46. *Id.* at 253.

clash with the norms of what Greene calls “nomic” groups or communities.⁴⁷

Greene’s critique of *Ordered Liberty* centers on his contention that it departs from political liberalism and embraces a comprehensive liberalism. He observes that we characterize our project as being to develop a constitutional liberalism by analogy to Rawls’s political liberalism, as distinguished from a comprehensive liberalism that would promote a comprehensive conception of the good life. But he argues that we (as well as Rawls) in fact promote a comprehensive liberalism.⁴⁸ A “true” political liberalism, he suggests, would be more “open-minded at a meta-level toward what may be good.”⁴⁹ We should distinguish two arguments he makes: (1) that even Rawls himself in fact goes beyond a political liberalism to a comprehensive liberalism, and therefore that our constitutional liberalism, to the extent it builds upon Rawls, goes beyond political liberalism, and (2) to the extent that we develop a “mild form of perfectionism” that would engage in a formative project to inculcate liberal virtues, we go beyond Rawls’s political liberalism to a comprehensive liberalism.

We have two responses. One, Rawls stays within political liberalism as he conceives it as distinguished from comprehensive liberalism as he conceives it. We do not mean that simply as a matter of definition. Rather, we mean that we do not interpret him as proposing imposing a comprehensive liberal conception of the good. Two, we did not claim to be explicating Rawls’s own views, or to be developing his constitutional theory, but instead to be developing a constitutional liberalism by analogy to Rawls’s political liberalism, and to be applying that Rawlsian view to topics that he himself did not address (or at least did not fully address). In fact, we believe that our constitutional liberalism is a civic liberalism that largely accords with Rawls’s political liberalism. We are reinforced in this view by the fact that Stephen Macedo, who has developed a civic liberalism concerned to secure liberal virtues, likewise conceives his project as broadly speaking Rawlsian.⁵⁰

47. *Id.* at 55.

48. Greene, *supra* note 1, at 422–30. For Greene’s full argument that Rawls goes beyond political liberalism to a comprehensive liberalism, see Abner S. Greene, *Uncommon Ground: A Review of Political Liberalism by John Rawls and Life’s Dominion by Ronald Dworkin*, 62 GEO. WASH. L. REV. 646 (1994).

49. Greene, *supra* note 1, at 433.

50. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); STEPHEN MACEDO, *LIBERAL VIRTUES:*

Greene assesses our claim to be political liberals with respect to “scope” and “grounds.” He acknowledges that we seem to be political liberals with respect to scope, for example, we are concerned to inculcate civic virtues essential to responsible citizenship, not moral virtues essential to the good life simpliciter. And he concedes that we justify our project on grounds of securing the capacities for responsible citizenship. Still, it seems that our embrace of a “formative project” and our characterization of our civic liberalism as a “mild form of perfectionism” leads him to think that we have crossed the line into comprehensive liberalism.⁵¹

In the end, the question whether we are “true political liberals” or whether Greene is a truer political liberal⁵² is less important than the question whether we have put forward an attractive and persuasive view. We believe that what drives Greene’s criticism is not so much a fastidious concern to be true to political liberalism as it is a concern to defend his own conception of pluralism over and against Rawls’s and ours. He rejects our “mild form of perfectionism” and indeed our “civic liberalism” because of his rejection of what he calls the “plenary sovereignty” of the state and because of his argument for “permeable sovereignty” and “the multiple sources of authority in a liberal democracy.”⁵³ We believe that he is wary of talk about government having a “formative project” because he sees that as incompatible with his vision of the state as just one of many sources of norms in the marketplace. In short, we think that the debate between Greene and us is more fruitfully framed as a debate between competing understandings of pluralism and the aspiration to *e pluribus unum* than as between a true political liberalism and a comprehensive liberalism. In his review, Greene appeals to a “deep and wide pluralism” or a “marriage of pluralism with political liberalism” that “permits groups to develop apart from the state.” This, he says, is “the best way to apply an appropriate liberal sense of doubt about whether we’ve gotten the right or best answers.”⁵⁴ He makes a plea for a constitutional “agnosticism.”⁵⁵

CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990).

51. Greene, *supra* note 1, at 423–27.

52. *Id.* at 433..

53. GREENE, *supra* note 45, at 20–24.

54. Greene, *supra* note 1, at 422.

55. GREENE, *supra* note 45, at 23.

Should we be so doubtful? One could read *Ordered Liberty* as an argument “against agnosticism” with respect to the importance of inculcating civic virtues and public values notwithstanding pluralism. Further, we interpret our constitutional order to support the view that government is not merely one among the many, but should have special weight in terms of the demands it makes upon us—and the responsibilities it has to us—as citizens. We disagree with Greene concerning these matters, but there is not room in this brief response to make the case fully.⁵⁶

Here we shall simply note two big reservations concerning Greene’s vision of pluralism. One, the aspiration to *e pluribus unum* is likely to implode without a more ambitious aspiration to *unum*—for example, an overlapping consensus among reasonable conceptions of the good and a formative project to inculcate civic virtues in circumstances of pluralism—than he allows. Two, we fear that the groups to which he would grant accommodations and exemptions in the name of the Free Exercise Clause and his commitment to pluralism are not likely to accept the limits he would impose upon them in the name of the Establishment Clause. We fear that such groups will not settle for what Greene calls the “political balance” of the religion clauses.⁵⁷ Moreover, we share Rawls’s concern that “unreasonable” groups, instead of honoring the “duty of civility,” will not forbear the attempt to impose their own comprehensive religious conceptions of the good through the political process.⁵⁸ Greene’s “balance” will prove to be too “reasonable” for them.

Finally, we want to make clear that we do not in our book develop a full blown theory of governmental speech. Greene focuses, in terms of his title, on “state speech.” And he pairs our book with Corey Brettschneider’s recent book entitled *When the State Speaks, What Should It Say?*,⁵⁹ Brettschneider, like us, aims to elaborate a political liberalism and, unlike us, does develop a

56. Each of us pursues our differences with Greene’s approach set out in his book, *Against Obligation*, in a forthcoming issue of *Boston University Law Review*; James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. ____ (2013); Linda C. McClain, *Against Agnosticism: Why the Liberal State Isn’t Just One (Authority) Among the Many*, 93 B. U. L. REV. ____ (2013).

57. GREENE, *supra* note 45, at 149–57.

58. JOHN RAWLS, *POLITICAL LIBERALISM* 58–66, 217–19 (1993).

59. COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012).

full blown view of governmental speech. Perhaps some of Greene's remarks are better directed against Brettschneider's theory of state speech than against our book. As suggested above, our discussion of the First Amendment is more about: (1) the tendency toward a rights absolutism in the protection of individual speech even among communitarians (Chapter 2), and (2) First Amendment clashes involving institutions of civil society and governmental promotion of equality, whether through antidiscrimination laws or marriage equality laws (Chapter 6). We want to observe an irony in Greene's criticism of our view with respect to state speech. He criticizes us (as well as Brettschneider) for going beyond political liberalism to comprehensive liberalism. Ordinarily, that would seem to imply that we see a larger role for the state in promoting a vision of the good life than would political liberals. Yet Greene argues that, within his own truer political liberalism, the state has a freer hand and a larger role in seeking to persuade people concerning a wide range of conceptions of the good.⁶⁰

IV. CONCLUSION: ALL THAT YOU CAN'T LEAVE BEHIND

We are honored that our book has prompted such thoughtful engagement by Massaro, Kersch, and Greene. Their essays demonstrate many of the complexities of working up an account of the ordering of rights, responsibilities, and virtues in our constitutional democracy at the present time: all that you can't leave behind, as U2 put it. Understanding and reimagining ordered liberty in circumstances of deepening pluralism and partisanship—when it may be “even worse than it looks”⁶¹—is an imperative project. The essays also raise questions for further research, many of which we expect to pursue in future work.

60. Greene, *supra* note 1, at 428–29, 431–32.

61. We allude to THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).